



# **FE 302 Lesson 5**

## **Project Issue Management Execution**

### **Changed Conditions on Construction Projects**

# TLO/ELO

Given a construction scenario, analyze project issues and formulate alternative resolutions

- Identify issues in assigned projects
- Analyze issues in terms of impact to project cost, schedule, and performance.
- Utilize any pre-existing risk mitigation plans to complete analysis
- Recommend the risk mitigation strategy to keep the project completion on track
- Estimate the time impact on adjustments to the risk management plan



**What causes  
changes to  
government facilities  
projects?**

**When to risks  
become issues?**

# What Makes Construction Different?

- Latent/Patent Ambiguities
- Contract Interpretation
- Impact Costs
- Delays
- Defective Design
- Excessive Punch Lists
- Changed Work Conditions
- Constructive Acceleration
- Constructive Changes
- Over Inspection
- Superior Knowledge
- Inspection of Construction
- Invoicing, Retainage, Withholding
- FOOH and HOOH
- Extended OH, Unabsorbed OH
- Use and Possession Prior to Completion
- Turnover of Construction
- Warranties
- Performance Evaluations
- Waiver of Completion Date

# Changes Clause

*FAR 52.243-4 (Fixed-Priced Construction >\$150,000)*

- **Policy**

- ◆ Establishes authority to make changes within the general scope of the contract

- **Purpose**

- ◆ Gives government flexibility and compensates contractor

- **Highlights**

- ◆ KTR must give written notification to KO within 20 days of perceived change order
- ◆ No adjustments after final payment

# Differing Site Conditions Clause

***FAR 52.236-2***

- **Policy**

- ◆ Requires KTR to notify GOV of any differing site conditions
- ◆ Must be done promptly and before conditions are disturbed
- ◆ Allows contractors to rely on bidding documents and info

- **Purpose**

- ◆ Shift risk to GOV
- ◆ Eliminates bid contingencies
- ◆ Cause bids to be more accurate

- **Highlights - 2 categories**

- ◆ Type I – Physical conditions on site differs materially from what is indicated on drawings of the contract
- ◆ Type II - Conditions differ from what is normally encountered, not reasonably anticipated

# Default Clause

***FAR 52.249-10*** (fixed-price construction)

- **Definition:** An omission or failure to perform a legal contractual duty
- **Policy**
  - ◆ Gives the government the right to terminate contractors who fail to perform well or complete the work
  - ◆ Allows contractors KTR to receive time extensions for delays
- **Purpose**
  - ◆ Provides remedy for breach of contract
- **Highlights**
  - ◆ GOV can terminate for actual or implied breach
  - ◆ 10-day notification requirement

# Default Clause (continued)

***FAR 52.249-10***

## ■ Limitations:

- ◆ The government can not terminate for default or assess liquidated damages if the delay arises from unforeseeable causes beyond the control and fault of the contractor
- ◆ Some examples are:
  - ☞ Acts of God or public enemy
  - ☞ Acts of the government
  - ☞ Acts of another contractor
  - ☞ Strikes
  - ☞ Unusually severe weather
  - ☞ Delays from subs and suppliers at any tier arising from unforeseeable causes beyond their control and that of the prime contractor



# Disputes Clause

## ***FAR 52.233-1***

- ◆ All disputes (and claims) that arise under the contract are resolved under this clause
- ◆ Contractor claims over \$150,000 must be certified
- ◆ Contractor claims accrue interest from the date received by the KO
- ◆ The contracting officer must issue a decision:
  - ☞ On claims less than or equal to \$150,000
    - Within 60 days of receipt
  - ☞ On claims greater than \$150,000
    - The KO must notify the KTR of the date which a decision will be made
- ◆ The KO's decision must inform the KTR of its appeal rights
- ◆ Alternative Disputes Resolution (ADR) is permitted

# Request for Information (RFI)

- RFIs are submitted by the general contractor who has question(s) about the contract's terms and conditions and wants a government response.
- RFIs can appear at any time, but most often:
  - At the preconstruction conference
  - At regular progress meetings
  - On a daily report (CQC or DRI) submitted to the COR
- KO must respond in a timely manner or a constructive change might occur

# **Request for Equitable Adjustment (REA)**

- Submitted by contractors usually following an RFI
- Contractors perceive a change to the contract not authorized by the KO
- REAs usually include a request for money, time, performance requirements or both

# Claim

- A claim is a written demand by one of the contracting parties seeking money, time, or both.
- Two Types of Claims:
  - ◆ Entitlement – Gov't Disputes Right for Additional Compensation.
  - ◆ Quantum – Gov't Considers Meritorious, But Not Agree On Amount

# REA vs. Claim

**“A Claim is an REA but an REA is not Necessarily a Claim”**

- Both can include direct costs, indirect costs, profit, and time.
- REAs:
  - ◆ The costs of preparing an REA (legal and accounting fees and negotiation expenses are allowable).
  - ◆ But interest is unallowable
- Claims:
  - ◆ The costs of preparing a claim and the prosecution of a claim are unallowable
  - ◆ But interest will accrue from the date submitted until the date of payment

# **Constructive Change**

**Definition: An oral or written communication, act or omission by the contracting officer or government official that is construed as having the same effect as a written change order.**

# **Differing Interpretations of the Contract**

- **Most Common Type of Constructive Change**
- **KTR & GOV'T Differ On What Is Required**
- **Order Element – GOV'T directs KTR to perform in accordance with GOVT interpretation**
- **Case Law Supports that KTR May Prevail If They have a Reasonable Interpretation**

# **Defective Specifications**

**“Protection for the Government”**

***DFARS 252.236-7001(b) Contract Drawings and Specifications***

- **The Contractor shall:**
- **Check all drawings immediately**
- **Compare all drawings and verify before layout**
- **Promptly notify the KO of discrepancies**
- **Be responsible for any errors that might have been avoided by complying with above**

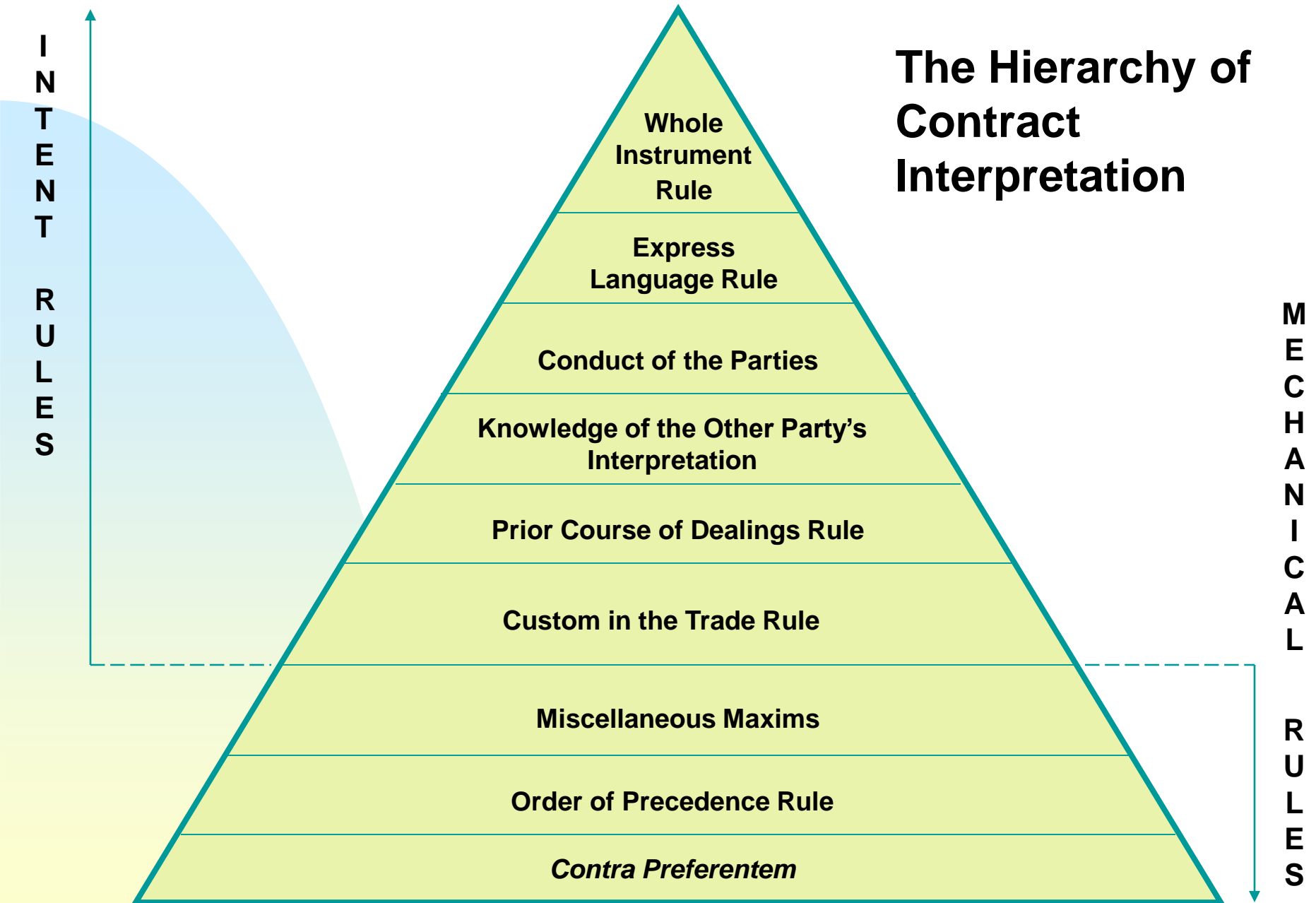


# Defective Specifications

## “Protection for the Government”

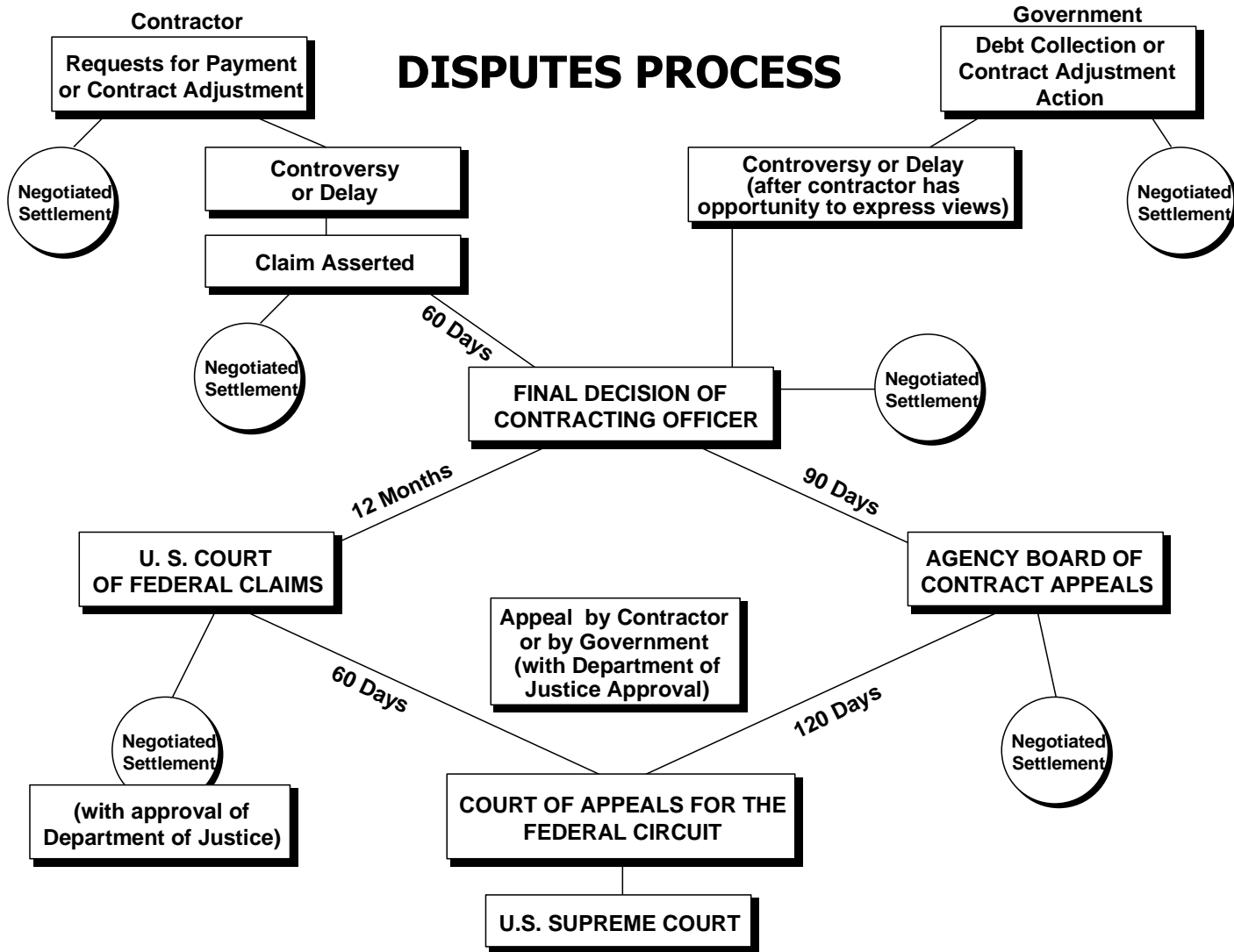
- ***DFARS 252.236-7001(d) Contract Drawings and Specifications***
- **What about omissions from the drawings and specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications or that are customarily performed?**
- ***These situations:***
  - “shall not relieve the contractor from performing such omitted or misdescribed details of the work. The contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.”***

# The Hierarchy of Contract Interpretation



***Don't Forget the Wild Card: The Duty to Inquire Rule***

# Disputes Process



# **Alternative Disputes Resolution**

ADR is defined as “Any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation.”

FAR 33.201

# A CONTINUUM OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

COOPERATIVE DECISION MAKING	THIRD PARTY ASSISTANCE WITH NEGOTIATIONS OR COOPERATIVE PROBLEM SOLVING			THIRD PARTY DECISION MAKING	
Parties are Unassisted	Relationship Building Assistance	Procedural Assistance	Substantive Assistance	Advisory Non-Binding Assistance	Binding Assistance
<ul style="list-style-type: none"> <li>• Conciliation</li> <li>• Information Exchange Meetings</li> <li>• Cooperative/ Collaborative Problem-Solving</li> <li>• Negotiations</li> </ul>	<ul style="list-style-type: none"> <li>• Counseling/ Therapy</li> <li>• Team Building</li> <li>• Informal Social Activities</li> </ul>	<ul style="list-style-type: none"> <li>• Coaching/ Process Consultation</li> <li>• Training</li> <li>• Facilitation</li> <li>• Mediation</li> </ul>	<ul style="list-style-type: none"> <li>• Mini-Trial</li> <li>• Technical Advisory Boards/ Disputes Panels</li> <li>• Advisory Mediation</li> <li>• Fact Finding</li> <li>• Settlement Judges</li> </ul>	<ul style="list-style-type: none"> <li>• Non-Binding Arbitration</li> <li>• Summary Jury Trial</li> </ul>	<ul style="list-style-type: none"> <li>• Binding Arbitration</li> <li>• Med-Arb</li> <li>• Mediation-then-Arbitration</li> <li>• Disputes Panels (binding)</li> <li>• Private Courts/ Judging</li> </ul>

# Lesson 5 Exercise

- Analyze the issues in your Lesson 3 scenarios
- Propose resolutions to the issues. Identify and quantify the impacts.
- Revisit your previously submitted RMP (Lesson 3) and determine if adjustments need be made
- Utilize the format provided in the next slide

# Lesson 5 Presentation

Team	Issue	FAR Cite	Risk Revisit	Discussion



**Questions?**